No. 15219

United States Court of Appeals

for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; EDWARD R. ESTER and LORRAINE M. ESTER, His Wife,

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REPLY BRIEF of Joint Appellants Barnett, Owens and Ester

Appeals from the United States District Court for the Western District of Washington, Northern Division.

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INTRODUCTION

In their brief, Barnett, Owens and Ester, carefully summarized the complaint, and the findings, conclusions and judgment of the lower court, and demonstrated that the judgment against them was erroneous and that the

action as to them should be dismissed. Legally and factually their position differs from that of the other appellants before this court.

The complaint (R. 3-22) was bottomed on a breach of a contract providing for removal of certain temporary war housing, and asked for damages for that breach and for other relief. The judgment awarded damages for breach of the contract (R. 114-117). But the judgment erroneously treated appellants, Barnett, Owens and Ester, as though they were parties to the contract and liable for its breach.

The trial court found that, since the "plaintiff has not proved that the future ascertainable installments of such just compensation have been paid" (R. 108), it had not proved its right to exclusive possession to the real estate. This being true, Barnett, Owens and Ester, fee owners of the real estate underlying the buildings, became the owners of the improvements, under the law of the state of Washington and under Federal law. Not having paid the rent due under the condemnation judgment,[1] appellee's term ended, its option to renew lapsed, and the improvements reverted to the fee owners of the real estate.

The questions involved in this appeal are simple and will be answered in this brief.

[1]The condemnation judgment (and amended judgments) is discussed in the Appendix A where the provisions for payment of just compensation, renewal of the term, and removal of improvements, are quoted.

1. Are fee owners of real estate liable in damages, based on an accounting of rents, from improvements on real estate which had reverted by operation of law to them?

2. Can it be said that mere knowledge of the terms of a contract providing for removal of buildings, serves as the basis for awarding damages against owners of property who are not parties to the contract?

3. In any event, did the Special Master correctly compute the rents received by the owners of the real estate, and was his fee excessive?

Before discussing the argument of appellee, it should be noted that appellee, in its brief (page 13), stated that it saw no need to burden this Court with two briefs. As a result, appellee, without distinguishing between the appellants Barnett, Owens and Ester and the appellants Century Investment Corporation and Virgil J. Pague, refers to "appellants" and uses the term "they" throughout the brief, casting a tremendous burden upon this Court and counsel, for factually and legally the positions of the two groups of appellants are as different as night from day.

Appellee also uses the terms "breach", "wrongdoing", "fraud", "windfall", and the like, apparently with the deliberate design to prejudice these appellants and influence the court. Nowhere in the findings of the trial court do such words as "fraud", "wrongdoing", "windfall" appear.

Referring to the breach of the contract for removal, appellee does not make clear that the contract was signed only by appellee and Century Investment Corporation and A. E. Sherman, alter ego of Virgil J. Pague (R. 64-67, Findings III-VII) on July 14, 1953; that the breach occurred on the date specified in the contract, i.e., on November 12, 1953 (R. 67, Finding IX); and that it was not until after those dates that appellant Barnett, Owens and Ester acquired their interests in the underlying real estate (R. 68, Finding XI).

Appellee states in its brief (page 17):

> "These facts alone constitute misrepresenation by part of the appellants. And it appears that the misrepresentation was deliberate since the letter from Century requesting the extension of time stated. . . ."

But appellee does not make clear that the letter of Century was dated November 2, 1953, months before Barnett and Owens purchased the real estate and prior to the time Ester became owner of his real property.

On page 17 of its brief, appellee says:

> "Based on the facts of this case, the district court determined that the appellants are not bona fide purchasers for value. (Concl. X, R. 77- 78) . . ."

The trial court did not make that statement. The court did say that Barnet, Owens and Ester:

> " . . . . were not innocent purchasers of same without knowledge and notice of the contract. . . ." (R. 78).

Appellee states that "this conclusion [that Barnett, Owens and Ester are not innocent purchasers for value] is fundamental in the case" (Br. 17). Since there is no such conclusion, we must assume that again appellee seeks to prejudice these appellants and confuse the court. All the trial court ever held was that, when Barnett, Owens and Ester purchased, they had knowledge that the original contract of July 14, 1953 provided for removal of the buildings. But the court also found that appellee and its agents knew that certain of the buildings were being rented in the fall of 1953 (R. 67-68); that the purchase by Barnett and Owens on January 20, 1954 was partly from Scougal and Crowe, who had purchased in September, 1953, had not removed the buildings, and had then sold the land and resold the building 104 (R. 69); that the purchase by Ester was from another third party (R. 69); that the time for performance of the contract had expired (R. 67, Finding X); that the Seattle Board of Public Works on October 8, 1953, had cancelled the use of certain streets and alleys on the ground that the use of the property as temporary housing had been abandoned (R .73, Finding XV); that the City of Seattle had permitted the buildings to remain on site for five years and that all of the buildings had been altered to comply with the code as permanent housing (R. 73).

The trial court did find, as appellee states (Br. 7), that the agent of the appellee (Michaelson) had in-

sufficient authority to vary the terms of the contract for removal (R. 75, Concl. V), but the trial court also found that the agent's knowledge that the property was being rented and that the extension granted by appellee's agents, was sufficient to discharge the surety (R. 77, Concl. IX). Why the agent's apparent authority was sufficient to discharge the surety but was not sufficient to deal with these appellants will always mystify Barnett, Owens and Ester, particularly because the Housing Authority of the City of Seattle was proud that buildings and units such as were involved in this case had been codified by the hundreds into homes and apartments (See Def's Ex. 6, containing photographs of numerous dwellings). Barnett, Owens and Ester surely could assume without being accused of fraud and wrongdoing that the buildings, on land owned by them, could be changed and codified from substandard temporary housing into standard dwellings, meeting the requirements of the City of Seattle. When that was done by these appellants, they were not, by some legerdemain, made parties to the contract sued upon.

Similar careless statements appear elsewhere (See Appendix B). The foregoing are sufficient to show that appellee's statements must be carefully analyzed, for this Court will not conclude, upon the basis of general and inaccurate accusations of wrongdoing and fraud, that Barnett, Owens and Ester were attempting to defraud their government. Such arguments are abhorrent

to the sense of justice and fair play with which Courts determine the rights of parties, be they the sovereign or the lowliest individual. We therefore turn to a discussion of the issues presented.

ANSWER TO APPELLEE'S ARGUMENTS

I.

Appellee's first argument (Br. 13) is that there was a clear breach of contract by Century such as would justify removal of the buildings or the award of damages; and that appellants Pague, Barnett, Owens and Ester had knowledge of and participated in those "breaches".

The short answer to that argument is that Barnett, Owens and Ester were not parties to the contract and cannot be held liable for its breach. (See authorities cited in appellants Barnett Br. 18-20). Appellee does not, and indeed cannot, dispute that proposition. Rather, appellee asserts that knowledge of the terms of the contract make Barnett, Owens and Ester liable for its breach. The law is clear:

> "Parties to a contract cannot impose any obligation upon a stranger to the contract under its terms." 12 Am. Jur. 812, § 265.

Whatever may be the liability of the other appellants, Century Investment Corporation and Virgil J. Pague, the argument appellee makes in this portion of its brief has no validity as to Barnett, Owens and Ester.

Pursuing its argument, appellee quotes the old equitable maxims: "One is not permitted to derive a benefit from his own breach of duty and obligation"; "It is contrary to equity that a defendant should be permitted to enjoy unmolested property received by wrongful acts"; and, "Where there is a wrong, there is a remedy". We do not quarrel with this hornbook law. But, so far as Barnett, Owens and Ester are concerned, these maxims have no more validity than the assertion that mere knowledge of the terms of a contract makes them liable for its breach. Appellee has stated in its brief that equitable relief is available against Barnett, Owens and Ester. The fundamental equity rule is stated in 3 Pomeroy's Equity Jurisprudence (3rd ed.) 460. §879:

> "If it does not appear that representations were made to the complainant, or with any expectation that they would come to his knowledge, or with any belief or reason to believe that they would induce him to act in the manner in question, there is no liability, for the reason that the necessary privity is not shown."

Barnett, Owens and Ester made no representations to appellee that they would remove the buildings. Nothing they did or said had anything to do with the making of the contract to remove the buildings, or with appellee's failure to pay the just compensation. The contract was made long before they acquired their interest in the property; and was breached before they purchased the

property. There was no privity between appellee and Barnett, Owens and Ester. Indeed, on the facts, there could not have been. There can be no liability as to them because the necessary privity on which to base equitable relief (as well as legal relief) is not shown.

With this principle in mind, the cases cited by appellee can be quickly disposed of. *Angle v. Chicago, St. Paul &c Ry.*, 151 U. S. 1, cited in footnote at page 16, on the proposition that appellants held the property in constructive trust, may or may not be applicable to the parties who breached the contract, but it has no application to Barnett, Owens and Ester, who lawfully acquired their property. The *Angle* case was one in equity to reach land in execution. A railway land grant had passed to the defendant by clear conspiracy, fraud and bribery in (1) inducing the judgment debtor to cancel a construction contract, (2) wresting control of the stock of the judgment debtor corporation to effectuate the cancellation, (3) inducing the legislature to cancel the land grant and (4) fraudulently securing the transfer of the land grant. Clearly this was a fraud case and the necessary privity was proved conclusively. The cited case is not authority for the proposition that mere knowledge of the terms of the contract renders Barnett, Owens and Ester liable in damages.

Nor is *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, (cited appellee's Br. 17) in point. There the plaintiff had failed to notify the insurer of increased

insurance as required by his policy with defendant company. The court correctly held that plaintiff could not "benefit from his own breach of duty and obligation" by failing to notify the insurer of increased insurance. Clearly, privity was established. In the case at bar, Barnett, Owens and Ester are not parties in any contract with appellee, and have breached no duty or obligation. Mere knowledge of the terms of the contract does not constitute a breach.

Arguing that equity will permit an award of damages against Barnett, Owens and Ester, appellee cites (Br. 19), *Keystone Co. v. Excavator Co.*, 290 U.S. 240, 245, to the effect that in the exercise of equitable powers courts "are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." In *Keystone* a patent was involved, and, since plaintiff had corrupted a witness and procured concealment of evidence in a prior infringement suit, the court held that said plaintiff could not come into court with unclean hands in a second infringement action. Again, there was no question of privity. *Keystone* is inapplicable to the case at bar.

Federal courts have rightly refused to be made an "abettor of inequity" (Appelle's Br. 20). To contend, as does appellee, that Barnett, Owens and Ester have "wronged" appellee and that the "right to some remedy" against them is clear, is nonsense in view of the findings of the trial court. They were not parties to the contract

and nothing they did or said in any manner misled appellee or induced appellee to act or not to act. There is no legal or equitable ground upon which damages can be awarded against them in this action.

II.

Appellee's second argument (Br. 20) is that the damages awarded in lieu of specific performance were not excessive. Again, this argument may or may not have validity as to appellants Century Investment Corporation and Virgil J. Pague, but it has none as to Barnett, Owens and Ester. Appellee cites no authority permitting specific performance or awarding damages against persons not parties to a contract or in privity with appellee. In this argument, appellee uses the term "appellants" broadly and carelessly, and though not applicable to Barnett, Owens and Ester, we are compelled to show that the argument is not well taken.

Appellee asserts (Br. 20, 21) that there were items for which appellants were liable in damages and which were not charged against them, referring to its deposits of rent. This assertion is grotesque. In the first place, no citation to the record is made. Secondly, the trial court found that appellee failed to prove payments of the amounts due under the condemnation judgment (R. 108, Supp. Finding II). The effect of this failure, of course, was that the interest of the appellee lapsed and its option to renew expired. Thirdly, appellee's own Exhibit 19 (a), (b), (c), shows that any deposits "pur-

portedly" (to use appellee's phrase) made are still in the clerk's possession and can be recovered any time appellee wishes to draw them.

There are simple answers to appellee's statement (Br. 21) that "since the appellants did not see fit to bring up all the evidence adduced below, they are not in a position to allege a failure of proof." First, the findings of the trial court are clear that appellee failed to prove its exclusive right to use and possession (R. 107-108, 111-112). Secondly, appellee itself could have brought up any portion of the record deemed helpful to it. Third, the fact is that the record before this court, and the findings made in the trial court, do not support appellee's contentions as to Barnett, Owens and Ester.

Next, appellee says (Br. 21) that it would have received far higher bids for the buildings if the contract had not required removal from site. This is an opinion of counsel, not supported by the record. The record does show the amounts spent by Barnett, Owens and Ester to remodel and codify the buildings (R. 29; 44), which would seem to refute counsel's opinion.

Appelle concludes its second argument (Br. 22) by stating that the necessity for incurring the Master's fee was entirely due to the "wrongdoing" of the appellants and should be charged entirely to them. Once more, appellee indulges in semantics, apparently with the hope that if these appellants are called "wrongdoers" fre-

quently enough some one will believe that they are. Actually, Barnett, Owens and Ester being the sole fee owners of the real state, and the buildings having reverted to them by operation of law because of appellee's failure to pay just compensation, it was error to order an accounting of any kind from them. No portion of the Master's fee can properly be assessed against these appellants.

III.

Appellee's third argument (Br. 22) is that the findings of the District Court which are challenged by appellants are not clearly erroneous and so should not be disturbed on appeal. Appellee divides the argument into four parts:

(a) Lack of determination of damages by the government's contracting officers (Br. 23);

(b) Error of the trial court in ordering an accounting and challenge to Special Master's work (Br. 26);

(c) District Court's supplemental findings and conclusions do not require reversal of judgment (Br. 32); and

(d) Argument of Barnett, Owens and Ester that the trial court erred in denying dismissal (Br. 34).

In this argument, as throughout its brief, appellee seldom distinguishes between the two groups of appellants. The argument is therefore confusing and hard to follow. We will now refer to the portions of this argu-

ment directed toward Barnett, Owens and Ester and show its inconsistencies and the inapplicability of the cases cited in support of it.

A.

Since this part of its argument consists wholly of appellee's answer to Century Investment Corporation and Virgil J. Pague, we pass it.

B.

This part of its argument is also apparently devoted to answering arguments made by Century Investment Corporation and Virgil J. Pague. However, one or two observations are in order. On page 27 of its brief, appellee states:

> " . . . the contract involved went only to the buildings and did not involve the underlying lands for which the Government had exclusive use through June 30, 1956."

The trial court held specifically that the government failed to prove its exclusive use to the land (R. 107-108; 111-112). Clearly, appellee's statement is inaccurate, for on the record there is no right to exclusive use due to failure to pay the just compensation awarded in the decree of condemnation. The right to exclusive use ended and the option to renew lapsed. Beyond that, because, as appellee states, "the contract involved went only to the buildings," Barnett, Owens and Ester cannot be held for a breach of that contract, to which they were not parties.

In this connection, it must be noticed that appellee's argument concerning the continuation of the emergency declared by the President until July 1, 1956, is meaningless. Presidential Proclamations and Congressional Resolutions extending the duration of the emergency do not and cannot affect the necessity of paying the just compensation provided by the Fifth Amendment. Not having been paid, the right to exclusive possession terminated and the improvements placed on the land reverted by operation of law to Barnett, Owens and Ester, the fee owners of the real estate. (See authorities cited in Barnett, Owens and Ester Br. 20-29.)[2]

Beginning on page 30 of its brief, appellee suddenly changes direction and asserts that, since Barnett, Owens and Ester acquired their interests after the date of the contract, that fact "accords no support." Appellee does not say what it means by "support." At this point it must be apparent it makes no difference whatever when Barnett, Owens and Ester acquired their interest in the real property. If, as the court found, appellee failed to prove its right to exclusive use of the real estate, the fee owners could use their property as they wished. And since the improvements reverted to the owners upon nonpayment of just compensation, the fee owners of

[2]On page 29, appellee refers to the securing of the use of streets "as a part of their scheme knowingly to violate the statutory and contractual obligation to remove the temporary housing herein involved." Obviously, this comment cannot refer to Barnett, Owens and Ester, for as the record shows the use of the streets was granted on Oct. 28, 1953, prior to the time Barnett, Owens and Ester acquired any interest in their properties (R. 73).

the real estate are not subject to damages for breach of the contract for removal of the buildings by others who were parties to it. The default in paying the annual rental provided in the condemnation judgment was appellee's own unilateral act. Mere knowledge on the part of these appellants that the parties to the contract for removal had not performed their obligation, does not make the fee owners of the land any less the owners, nor does it affect the legal principle of reverter here involved.

It is also significant that appellee, under the condemnation judgment, had the right to renew its term from year to year upon payment of the just compensation provided in the decree. This right or option to renew was also abandoned or forfeited by appellee when it failed to pay the just compensation. That a right to renew is a valuable right has often been recognized. In *United States v. General Motors,* 323 U.S. 373, 376, Justice Roberts said:

> "After judgment had been entered on the verdicts the court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to describe the interest taken as 'a term of years . . . expiring June 30, 1943, renewable for additional periods thereafter . . . at the election of the Secretary of War,' on specified notice of intent so to renew. . . . We do not understand that these facts alter the question

before us. The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded. . . . "

The unilateral act of appellee in failing to pay the just compensation provided in the condemnation judgment had definite legal consequences: First, appellee lost its right to exclusive possession; second, appellee lost its right to renew the term for additional periods; third, the improvements on the real estate reverted, by operation of law, to the fee owners.[3]

Next, appellee asserts that this Court will not review the findings of the Special Master. Appellee does not meet or discuss the position of Barnett, Owens and Ester (Br. 39-45) that, assuming the propriety of a reference to the Master, his errors were such as seriously to prejudice Barnett, Owens and Ester, because his capricious and arbitrary use of improper accounting methods resulted in an erroneous net income figure for them. This erroneous figure was then carried into the judgment with the result that the judgment itself is erroneous.

[3]The governments' right to remove runs concurrently with its use and occupancy where its interest in the land was the exclusive use thereof from year to year and the right to renew during the war emergency and three years after. *United States v. 16.747 Acres*, 50 F. Supp. 389.

In the absence of specific provisions to the contrary, where the government reserves the privilege of removing structures at the termination of the lease term, ownership passes to landowner if structures are not removed

within the stipulated time, and, where the government condemned the land after the expiration of the lease, it was held that it must pay just compensation for the buildings erected by it. *United States v. Certain Parcels, etc., Outer Harbor Dock & Wharf Co.*, 131 F. Supp. 65, citing *United States v. Hayman*, 115 F. 2d 559, 601.

Outer Harbor involved a lease providing that "improvements 'shall be and remain the property of the government. . . , ' thus evidencing a clear intent contrary to the law of fixtures, . . . "

Hayman involved a lease by which radio towers remained the property of the United States and the government reserved the privilege of removing them at the end of the lease or within ninety days thereafter. The court said: "It is obvious that if the government should fail to remove the property before the expiration of the 90 days after the termination of the lease, the United States would lose the value of the property."

In the case at bar, the condemnation judgments provided that the title to improvements should remain in the United States, "except as hereinafter provided," and that "prior to the termination of the lease" appellee was required to remove the improvements. (See Appendix A where provisions of the condemnation judgments are quoted.)

All the appellee says in answer to the detailed and obvious errors of the Master is that this Court will not conduct a trial de novo and that the finding of a special master and a court are "well-nigh conclusive". It need not be supposed that Barnett, Owens and Ester ever asked this Court to conduct a trial de novo, but certainly it is proper for them to urge an appellate court to examine a record for clear error and arbitrary action. Appellee's authorities cited in support of this argument are not applicable to the situation here confronting the court.

Stonesifer v. Swanson, 146 F. 2d 671, 672 (cited appellee's Br. 30) was a suit to set aside an estate settlement agreement. The issues were referred to a master, whose report was approved and who found that there was insufficient evidence to establish a valid gift. The

circuit court held that the evidence not only supported the findings of the master and district court, but:

> " . . . in our opinion makes a contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted as to the issue of the relationship of some of the parties,"

and

> " . . . we are not satisfied that the evidence warrants or justifies our disturbing the findings of the Master confirmed as they are by the District Court."

The circut court did review and found sufficient evidence to support the findings. For appellee to cite this case as authority for the court not doing what it did is unbelievable.[4]

[4]The other cases cited by appellee in its footnote (Br. 31) are equally inapplicable. *Westchester County Park Commission v. United States*, 143 F. 2nd 688, was an eminent domain case and did not involve a master. A syllabus for the case states: "On landowners' appeal from condemnation award, appellate court cannot conduct trial de novo but trial court's determination of fact must stand unless unsupported by substantial evidence. . . . "

Seagram Distillers Corp. v. New Cut Rate Liquors, 221 F. 2nd 815, 820, held that the evidence supported the trial court's finding that, unless enjoined, defendant's wrongful conduct in selling liquor below fair trade prices would irreparably injure plaintiff. Appellee's quotation from this case is misleading for the court was saying: "The purpose of a preliminary injunction is to preserve the subject matter of the controversy in its then existing condition to preserve the status quo." One of the cases used as the basis for its decision was *Mayo v. United States*, 309 U.S. 310, which was a direct appeal to the supreme court and which reversed the district court, saying, "We think the court committed serious error in thus dealing with the case upon motion for a temporary injunction."

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82, held that ample evidence supported the findings and judgment of the trial court, and that the fact that the lower court may have perhaps followed improper practices in directing counsel to prepare the findings would not authorize the appellate court to review evidence de novo but proper procedures required remanding to district court with directions to make new findings.

Empire District Elec. Co. v. Rupert, 199 F. 2d 941, an action for personal injuries, resulted in a reversal of a verdict of a jury on the ground that plaintiff was contributorily negligent. The court said: "We realize that this court is 'an appellate court sitting to review alleged errors of law and not to try the action de novo . . . nor can it be forgotten that a jury does not have the power to render a capricious and arbitrary verdict in total disregard of the evidence." No finer authority could have been cited by appellants Barnett, Owens and Ester to support their contention that the circuit courts recognize their clear duty to review errors of law and to prevent the trier of the facts (the master in the case at bar) from making capricious and arbitrary findings in total disregard of the evidence.

Ralston Purina Co. v. Novak, 111 F. 2d 631, an action for the recovery of the balance of the purchase price for hog feed, was tried by a jury. On appeal the appellant failed to set forth the erroneous ruling and the manner in which the trial court erred. The circut court simply held: "The sufficiency of the evidence to sustain the judgment is therefore not open to review."

On the proposition that the "well-nigh conclusive nature of concurrent findings of a special master and the Court" have been frequently stated, appellee cites five cases (Br. 31).

Appellee's quotation from *Cooper v. Brown,* 126 F. 2d 874, 879, is incomplete. But the unquoted portion of the paragraph states: " . . . as there is evidentiary support for the finding of the master and of the court with respect to the income item, patently the finding cannot be considered as clearly erroneous. There is therefore no basis upon which we could disturb the finding. Fed. R.C.P. 52 (a), 28 U.S.C.A. following § 723 (c);. . . . "

Frank Adam Electric Co. v. Colt Patent Fire Arms Mfg Co., 148 F. 2d 497, was a patent suit and held that the findings of a special master, approved by the district court, are conclusive insofar as they are not clearly erroneous.

Parker v. United States, 126 F. 2d 370, held that since

the evidence before the master was not included in the record, the master's finding must be accepted.

Prentice v. Boteler, 141 F. 2d 175, a Ninth Circuit bankruptcy proceeding, held that confirmation by the district court and the referee of a trustee's sale will be approved in the absence of a clear showing of abuse of discretion.

Boyce v. Chemical Plastics, 175 F. 2d 839, held: "It is a settled rule of this and other courts that the findings of fact by a referee in bankruptcy, if supported by substantial evidence, are not clearly erroneous; and if approved, confirmed and adopted by the district court, they will not be disturbed on appeal."

All the foregoing authorities support the position of Barnett, Owens and Ester for review of rulings "clearly erroneous". As happened in this case, where a master arbitrarily and capricously errs, the appellant courts have never refused to correct such errors, when the same have been properly and completely brought to their attention by objections to the master's report. In the case at bar the master's errors clearly appear on the face of the record itself, and his errors were carried into the judgment itself. Arbitrary and discrimatory action, abuse of discretion, and clear error will always be rectified by an appellate court.

C.

The third part of this argument by appellee (Br. 32) is devoted to a discussion of what is denominated "the asserted" ground that appellee lost its tenure in the lands underlying the buildings because of "alleged failure" to pay the compensation prescribed in the condemnation proceedings. The trial court found that the just compensation had not been paid (R. 108). Why call a specific finding of the trial court an "allegation"?[5]

Appellee then states that there are simple answers to the contention of Barnett, Owens and Ester (Br. 20-29) that the appellee, having failed to pay just compensation, lost its right to exclusive possession. Let us examine those simple answers.

First, appellee contends that the government cannot be ousted from possession and use and the only remedy of anyone having interests in the land is a suit under the Tucker Act, because the government may "take" property in the exercise of the power of eminent domain without filing condemnation proceedings. The cases cited in support of this proposition by appellee (Br. 32) reveal immediately that appellee has failed to distinguish between a "losing" and a "taking". This case is not a *taking* of property in the exercise of eminent domain; it is a *losing* of exclusive use and possession of property and the option to renew the annual term, because of

failure to pay just compensation. Even though this should be obvious and dispose of the question, a short analysis of the cases cited by appellee quickly exposes their inapplicability to the facts of this case.[6]

[5]Here and at page 10 of its brief, appellee write of an administrative practice with respect to the payment of taxes. All of this discussion is wholly de hors the record.

[6]In *Campbell v. United States*, 266 U.S. 368, it was held that the erection of a nitrate plant on adjoining property did not constitute a "taking". The owner had been awarded compensation for two tracts but he was denied compensation for a third tract not taken but which he claimed was damaged by the use of adjoining lands. The court held: "The proposed use of lands taken from others did not constitute a taking of his property. . . . " and "In the absence of a taking, the provision of Fifth Amendment giving just compensation does not apply. . . . " This case is not authority for appellee's propostion that the government may take property without formal condemnation proceedings, since there was no "taking" involved.

In *Hurley v. Kincaid*, 285 U.S. 95, an injunction was denied to a landowner whose lands were threatened with flooding caused by increasing the height of the levees, being done under the lawful exercise of authority pursurant to an Act of Congress. It was held that, if the owner was damaged, he had an adequate remedy at law under the Tucker Act for any injuries. It was further held that he was not damaged yet and the court reiterated the common holding that the Fifth Amendment does not entitle him to be paid in advance of the taking. Again, there had been no "taking" and the case does not support appellee's proposition.

In *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, judgment against a contractor who had been doing work lawfully under the direction of the Secretary of War was reversed and it was held he was not personally liable. The court said: " . . . petitioner's claim resting upon the theory that there has been a taking has been found untenable". Again, this case is not authority for the proposition of appellee for the reason that there had been no "taking".

Causby v. United States, 328 U.S. 256, allowed damages for a "taking" held to result when aeroplane noises in landing and taking off from a lawfully used airfield resulted in depriving the adjoining owner of complete dominion and control of his property and damaged his chicken business. This *is* the situation for the Tucker Act because the damage flowed from a lawful act giving rise to an implied contract to pay for a "taking" of property.

Appellee's footnote 21 (Br. 32) ends with the statement, "and such possession may be taken even when the court has refused in condemnation proceedings to enter an order of possession. *United States v. Merchants Transfer & Storage Co.*, 114 F. 2d 324 (C.A. 9, 1944)." In the cited case, the United States, under

proper statutory authorization, had petitioned for immediate possession of the premises, as requested by the Secretary of War under the Second War Powers Act. The lower court held that the United States was not entitled to *immediate* possession. Upon a seizure of the premises by the army, the court ordered the United States to return the property and, in the event of its failure so to do, ordered that it be held liable in damages as for contempt. On appeal, this court held that the district court had not jurisdiction to order the United States to vacate the premises or to adjudge the government liable in damages for its failure to obey the injunction; further, that the trial court was in error in substituting its judgment on the question of public necessity for that of the Secretary of War acting under the Second War Powers Act. The holding of the court concluded: The Declaration of Taking should now be filed on just compensation determined speedily under the statues. The Tucker Act was not involved. In addition, the original attempt to take was lawful under the Declaration of Taking Act. This case does not support appellee's proposition that appellee may take or continue to use property without formal condemnation proceedings being filed. A critical reading of the case suggests that, although the trial court was wrong in its procedure in issuing its injunction and threatening contempt, so also was the United States for not filing its Declaration of Taking and making its deposit with the Clerk of the Court.

The Tucker Act provides for suits against the United States government upon implied promises to pay compensation for injuries and damages resulting from lawful acts. It is not a substitute for condemnation proceedings. Here, where the government failed to pay the just compensation awarded by a judgment in condemnation, it loses its right to exclusive use. That ends the matter. If it can show a public use for the property, it can again condemn it and pay just compensation for it. The Tucker Act has no bearing on the situation here at issue.

It need not be added that appellee was not "ousted from its possession and use" (Appellee's Br. 32). By failing to pay just compensation, appellee, in effect, abandoned its right to exclusive possession and use and

its right to any option to renew its annual term. In any event, it was not "ousted" for the simple reason that it was not in lawful possession at the time Barnett, Owens and Ester acquired their interests in the property. Long prior to that time, the buildings had been sold and the appellee's rights abandoned (R. 73). Other third parties had been in possession between the time the buildings were sold by appellee and purchased by Barnett, Owens and Ester.

Appellee (Br. 33) next suggests that these appellants are making a collaterial attack on the condemnation proceedings. This suggestion is absurd. Barnett, Owens and Ester are not attacking the condemnation action; they simply show the failure of appellee's own proof and that its failure to pay the just compensation provided for by that judgment had certain definite legal results—abandonment of appellee's right to exclusive use and possession.

Third and lastly, appellee (Br. 33) states that the district court did not purport to hold that the United States had lost its tenure in the land. Is this a play on words? In its complaint appellee alleged: "That the plaintiff, United States of America, at all times herein mentioned, had and does now have exclusive use of said real property. . . . " (R. 8). The finding of the district court is: "That it was incumbent upon the plain-

tiff herein to prove its exclusive right of possession of the land. . . " and "That the plaintiff has not fully sustained that burden, in that, although the judgment on the declaration of taking and the judgments amending just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; . . . " (R. 107-108). In short, appellee failed to prove one of the basic elements of its case. It makes no difference what happened or happens in the condemnation action. The court found that the appelle had failed to prove its exclusive right to the land.[7]

It is clear that, if the government does not and did not have exclusive right to the use and possession of the land, it was error to assess damages against Barnett, Owens and Ester as the fee owners thereof. And since Barnett, Owens and Ester were not parties to the contract, and did not in any way mislead appellee or cause appellee to take or refrain from taking any action, there

[7] "References to the termination of the government's estate as of June 30, 1956 by notices filed in the condemnation proceeding are completely de hors the record. We may be permitted to state, also de hors the record, that, as of February 8, 1957, no order has been entered terminating the government's tenancy. There was filed, however, on October 4, 1956, a notice of the government's intent to terminate its leasehold and a motion to dismiss without payment of damages for parcels 1 to 10 inclusive. This notice and motion has not been heard as yet. Appellants Barnett, Owens and Ester answered the motion and stated that this case was before the appellate court and that damages should not be waived on motion; and that by responding to the motion these appellants did not admit that the tenancy was in effect, but alleged that, to the contrary, the tenancy had already been terminated by operation of law. We are filing in this Court a certified copy of the Clerk's Docket in the condemnation action to show the status of that proceeding as of this time. See Appendix D.

is no legal or equitable basis upon which a judgment against them can be sustained.

D

In this concluding portion of its argument, appellee states that the trial court was correct in denying Barnett, Owens and Ester's motions to dismiss, because of the equitable nature of the case. This argument has been answered heretofore. Suffice it here to say that Barnett, Owens and Ester were not parties to the contract, and nothing they did or said in any manner misled appellee or induced appellee to act or not to act, nor caused appellee to default in payment of just compensation decreed as the annual rental. Thereafter, according to the judgment in condemnation and the stipulations made a part of the judgment, the option to renew lapsed and the buildings, not being removed prior to the expiration of the term as provided therein, became the property of the fee owners of the land. The right to remove prior to termination was lost by appellee—it had the option and abandoned it.

It was error to deny the motions of Barnett, Owens and Ester to dismiss them on the grounds that appellee neither stated nor proved a claim against them on which judgment could be based.

Conclusion

In their opening brief, Barnett, Owens and Ester contended:

1. Being owners of the land underlying the buildings, not being parties to the contract sued upon, and there being no findings of the trial court justifying the assessment of damages against them, there is no basis in law or fact upon which to sustain the judgment as to them;

2. The denial of their motions to dismiss before trial on the ground that the complaint failed to state a claim (R. 22-23), and the denial of the motion (R. 119) to dismiss after trial for failure to prove a claim on which judgment could be based, was error; and

3. The trial court erred (R. 115) in confirming and adopting the Special Master's reports, which (a) failed to apply proper accounting methods or (b) proper depreciation schedules, (c) incorporated clear error and obvious inconsistencies, and (d) for which he was allowed an exorbitant fee.

Appellee answered these contentions by arguing:

1. There was a breach of contract by appellant Century Investment Corporation and that Barnett, Owens and Ester had knowledge of and participated in those "breaches";

2. The damages awarded in lieu of specific performance were not excessive; and

3. The findings by the trial court are not clearly erroneous and so should not be disturbed on appeal.

Clearly, appellee did not meet the contentions of

Barnett, Owens and Ester. The fact that they had knowledge of the provisions of the contract with Century Investment Corporation for removal of the buildings and of its breach, prior to the time they acquired any interest in the properties, cannot and does not render them liable, either at law or in equity, for breach of that contract to which they were not parties. Nor does knowledge of the terms of the contract make them any less the owners of the real estate. By its unilateral act in failing to pay the just compensation provided in the condemnation decree, appellee lost its right of exclusive use and possession of the real estate and lost its right to renew its term, and, by operation of law, the improvements then on the real estate reverted to the fee owners. Thus it was error to order an accounting of rents received by Barnett, Owens and Ester, and it was error to confirm the obviously arbitrary and incorrect findings of the Master and incorporate those findings into a judgment against Barnett, Owens and Ester, together with a judgment for a part of an exorbitant fee awarded to the Master.

Whatever may be the validity of its argument with respect to appellant, Century Investment Corporation, which signed the contract, and to appellant, Virgil J. Pague, who was found by the court to be the real party in interest (R.64-65)—the appellants who actually breached the contract—appellee has failed to establish

a legal or factual basis upon which the judgment against Barnett, Owens and Ester can be supported.

Appellee's second contention that the damages awarded in lieu of specific performance are reasonable, is inapplicable to Barnett, Owens and Ester, because there is no proper ground on which to award any damages against them.

Appellee, in its third contention, states that the findings of the trial court are not clearly erroneous and should not be disturbed on appeal. Appellants Barnett, Owens and Ester have not, and do not, contend that the findings of the trial court are erroneous. They do contend that, based on those findings, it was error in law to award judgment against them, and that this court, on those findings which state the facts here existing, will reverse the judgment of the trial court and dismiss Barnett, Owens and Ester.

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

Attorneys for Barnett, Owens and Ester
1304 Northern Life Tower
Seattle 1, Wash.

APPENDIX A

The burden was upon the appellee in this case to prove its allegation that "the plaintiff [appellee] at all times herein mentioned, had and does now have exclusive use of said real property. . . . " (R. 8). The trial court found that appellee did not prove its right to exclusive possession (R. 107-108; 111-112).

The purported right to exclusive possession was founded on certain condemnation proceedings in the District Court (Cause No. 1143 of which in the case at bar the trial court took judicial notice. R. 64). To aid this court in understanding the condemnation proceedings—in the absence of any explanation thereof by appellee—the following reference to Exhibits introduced in this action will be helpful:

In the condemnation proceedings the properties now owned by appellants Barnett and Owens are referred to as Parcels 3 and 4. The properties now owned by Ester are Parcel 5 and a portion of Parcel 6.

Appellee first took possession under an order of the District Court dated February 21, 1945, which preceded its filing of a Declaration of Taking and a deposit of estimated compensation. The Declaration of Taking was dated May 23, 1945, and was filed June 15, 1945 (Ex. 34). Judgment on the Declaration of Taking (Ex. 35)

was entered June 16, 1945 and vested the exclusive use of the lands in appellee "for a period of one year, with the right to renew from year to year for the duration of the existing national emergency and three years thereafter, together with the right to remove at the termination of such use all improvements constructed or placed thereon. . . ."

This judgment was amended frequently and the amendments were based on stipulations entered into between appellee and successor owners of specific parcels. A list of amended judgments, affecting Parcels 3, 4, 5 and 6 (with which we are concerned) follow:

Parcel 3 (now owned by Barnett and Owens):

Judgment of February 14, 1946. (Ex. A-31)

Judgment of May 3, 1951, (Ex. A-32)

Judgment of May 23, 1952 (Ex. A-30)

Parcel 4 (now owned by Barnett and Owens)

Judgment of September 28, 1945, (Ex. A-33)

Judgment of February 20, 1952, (Ex. A-34)

Parcel 5 (now owned by Ester)

Judgment of September 28, 1945, (Ex. A-2)
Judgment of July 23, 1951, (Ex. A-35)
Judgment of March 21, 1952, (Ex. A-36)

Parcel 6 (now partially owned by Ester)

Judgment of September 28, 1945, (Ex. A-37)
Judgment of May 3, 1951, (Ex. A-38)
Judgment of March 21, 1952, (Ex. A-39)

As stated, these judgments were based on stipulations between appellee and the then owners of the fee title. While each one varied in detail, all contained identical language regarding just compensation and the amount of rental to be paid for the term. The following is quoted from the judgment of February 14, 1946 (which affected Parcel 3 and is Ex. A-31) and, as stated, each of the judgments also contained this language:

> "1. That the sum of . . . is the just compensation and the total amount of damages to be awarded and paid for the taking by the United States of America for the exclusive use of said property . . . for one year beginning February 21, 1945, the date the United States acquired possession. . . .
>
> "3. That the United States may exercise its right to renew the estate taken in said land from year to year as provided in the declaration of taking. . . .
>
> "6. . . . Title to all such alterations, structures, fixtures and improvements shall be and remain in the United States, except as hereinafter provided;
>
> "7. Prior to the termination of the lease, the Federal Public Housing Authority shall remove all buildings erected or constructed by it upon the demised premises; . . ."

APPENDIX B

Illustrations of statements de hors the record contained in appellee's brief follow:

1. Page 4, footnote 4, refers to the government's extension of its exclusive use for another yearly period to February 21, 1957, but subsequently terminated as of June 30, 1956. The same matter is also referred to on page 33, footnote 22, stating that the termination, as of June 30, 1956, was by appropriate notices filed by the government in the condemnation proceedings.

All of this is wholly outside the record made in this case. (See also the certified copy of the clerk's docket of the condemnation action which has been filed in this court and Appendix D.)

2. Page 6, footnote 5, states " . . . In this connection, the Public Housing Administration has advised: 'There is no justification nor consideration for such an extension. The Seattle Housing Authority was not the agent of this Administration for that purpose. It was not party to the Removal Contract.' . . . "

This is another statement completely de hors the record.

3. Pages 9, 26, 29 and 35 contain references to an Oral Decision of the trial court (set out in the Appendix to Appellee's Brief, pp. 36-41).

Again, the Oral Decision is not a part of the record before this court. Of more importance, however, is the fact that this oral opinion, the gist of which was to compel removal of the buildings, was rescinded and reversed by the trial court prior to the entry of judgment which did not order removal of the buildings.

4. Page 10 contains a long discussion of the administrative practice with regard to the payment of real estate taxes.

All of this is de hors the record.

5. Page 10 also contains the statement that "the district court apparently used the tax matter discussed above" as the reason for awarding damages rather than specific performance.

A trial judge always has the right to change his oral decision, amend it, or disregard it, if upon further reflection, and prior to the entry of judgment, he changes his mind. Of what value is an oral decision which has been changed?

6. Page 13 (item 2) and Pages 20 and 21 state that there are not included in the award of damages a number of items of damages to the United States.

All of this is de hors the record and is pure speculation.

APPENDIX C

Seattle, Washington
October, 9th 1953

Century Investment Corporation
914 Dearborn Street
Seattle

Attn: Mr. A. Rontai and Mr. O. Cohen

Gentlemen:

This letter will confirm our agreement as regards Building No. 102 and Building No. 103, located on the Duwamish housing project, Wash.-45302, which I have purchased as an individual from the Century Investment Corporation of Seattle.

The purchase price is $2051.09 for each building, however, building No. 103 has only 10½ apartments and I therefore will receive credit for 1½ apartment which has been cut from building No. 103. I will also pay the sales tax on this purchase if so required by law.

I will also assume personal responsibility for proper release by Seattle Housing Authority for removing said two buildings, and I hereby agree to hold A. Rontai and Orville Cohen and Century Investment Corporation, free and harmless on any action taken by Seattle Housing Authority for removal of Buildings No. 102 and No. 103.

I further authorize A. Rontai, Treasurer of Century Investment Corporation, to charge the sale price of these buildings to me personally and against my investment in Century Investment Corporation, of which I am the President.

All statements made in this letter apply only to Building No. 102, 6500 Maynard Ave. and Building No. 103, 6528 --6th Ave. South, Seattle, but does not apply to any other buildings which are located near by and are part of Duwamish Bend Apts., Wash.-45302.

Signed this 9th Day of October 1953, at Seattle, Wash.

/s/ V. J. Pague
V. J. Pague, Purchaser

/s/ A. Rontai
Century Investment Corp.
Treasurer and Director

[Plaintiff's Exhibit 17]

APPENDIX D

SEATTLE, WASHINGTON
DECEMBER 5TH, 1953

CENTURY INVESTMENT CORPORATION
914 Dearborn St.
Seattle, Wash.

Attention: Mr. Albert Rontai and Orville Cohen

GENTLEMEN:

The undersigned, purchaser from Century Investment Corporation of the following described buildings in the Duwamish Bend Apartments, Wash. - 45302:

Building No. 102	6500 Maynard Ave.
Building No. 103	6528 - 6th Ave. So.
Building No. 104	6542 - 6th Ave. So.
Building No. 105	6361 Maynard Ave.

hereby assumes personal responsibility for full and proper release by the Seattle Housing Authority of the Century Investment Company's contract for the removal of said buildings and site clearance and hereby agrees to save and hold harmless Albert Rontai, Orville Cohen and the Century Investment Corporation on account of any action taken by the Seattle Housing Authority for removal of said buildings and site clearance, and further agrees to hold said persons and corporation harmless under Hartford Insurance Company Bond No. 2790141,

given to the Seattle Housing Authority for the faithful performance for said corporation's contract for building removal and site clearance, it being understood that the Seattle Housing Authority now requires the removal of said buildings and site clearance by January 15, 1954. DONE in Seattle, Washington this 5th day of December, 1953.

/s/ Virgil J. Pague
Virgil Pague

Witnessed by:
/s/R. F. Edmondson

[Plaintiff's Exhibit 18]

APPENDIX E

Being certified copy of document in Cause No. 1143, from April 18, 1955 to and including November 14, 1956, U. S. v. Certain Lands in King County, et al, said document being filed in Circut Court.

1956

Apr. 3 Filed Clerk's receipt of $541.00, Par. 1 through 10 inclusive ..... (482)
Apr. 16 Filed Stipulation for Dismissal of Par. 14 (Balance) ..... (483)
Apr. 16 Filed Agreement for termination of exclusive Us. Par. 14 ..... (484)
Apr. 16 Filed & Ent. Order dismissing Par. 14 (Balance) ..... (485)
June 4 Filed Stipulation for Dismissal Parcel 21 ..... (486)
June 4 Filed Agreement for termination of exclusive use ..... (487)
June 4 Filed and entered Order of Dismissal Parcel 21 ..... (488)
June 4 Filed Stipulation for Dismissal Parcel 11 ..... (491)
June 4 Filed Petition for withdrawal of funds year beginning Feb. 21, 1955 ..... (489)
June 4 Filed Order directing payment of funds parcel 11 ..... (490)
June 4 Filed Agreement for Termination of exclusive use Parcel 11 ..... (492)
June 4 Filed and entered Order of Dismissal Parcel 11 ..... (493)
June 19 Filed receipt for Check No. 10167, Parcel No. 11 ..... (494)
June 25 Filed petition for withdrawal of funds deposited for year beginning Feb. 21, 1954 (Parcel 17) ..... (495)
June 25 Filed and ent. order directing payment of funds deposited for year beginning Feb. 21, 1954 (Parcel 17) ..... (496)
June 25 Filed stipulation for dismissal, Parcel 17 ..... (497)
June 25 Filed and ent. order of dismissal, Parcel 17 ..... (498)
June 25 Filed agreement for termination of exclusive use, Parcel 17 ..... (499)
July 2 Filed receipt for Check 10176, Parcel 17 ..... (500)
Oct. 4 Filed Plaintiff's notice of termination of leasehold and motion to dismiss without payment of damages, Parcels 1 to 10 inclusive ..... (501)
Oct. 18 Filed Marshal's return on notice of termination of leasehold and motion to dismiss action without payment of damages, Virgil T. Pague and sixteen and not found, Mary J. Chase, deceased and not found Flo Rae ..... (502)
Nov. 14 Filed Answer of Edward R. Ester et ux to Ptff's Notice of Termination of Leasehold and motion to dismiss action without payment of Damages ..... (503)
Nov. 14 Filed Answer of Arthur G. Barnett, et ux, et al to Ptff's Notice of Termination of leasehold & Motion to Dismiss action without payment of Damages ..... (504)